

**Petrie + Pettit, S.C.**

**Tips on Avoidable  
Employment Traps**

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**Independent  
Contractor  
Misclassification**

# **Reasons Employers Use Independent Contractors**

- **Avoid Liability for Overtime Payments**
- **Avoid Liability for Payroll Taxes**
- **Avoid Workers Comp Premiums**
- **Avoid Unemployment Liability & Assessments**
- **Avoid Coverage by Discrimination Laws and Employer Paid Benefits**

# **Independent Contractor Misclassification**

- **Budget and Policy Concerns Are Driving “Misclassification” Compliance Efforts by Governmental Agencies To Increase Tax Revenues and Expand Coverage of the Workplace Protections Provided by Labor Laws to More Workers**
- **Multiple Class Actions are seeking Overtime Payments for “Independent Contractors”**

# **Independent Contractor Misclassification - Tests**

- **Control the details of their work**
- **Maintain separate business with office, recurring liabilities & FEIN**
- **Make services available to others**
- **Have real opportunity for profit/loss**
- **Provide their own tools**
- **Provide non-core services**

# **Misclassification of Employees as Exempt from Overtime Requirements**

**Three Primary Tests Determine Qualification for Exemption:**

- 1. Salary Basis Test**
- 2. Salary Level Test**
- 3. Job Duties Test**

# Salary Basis Test

- Deductions from salary only for:
  1. Full day absence for personal reasons
  2. Full day absence for illness/disability, if deduction is pursuant to plan/policy providing compensation for such absences. Can include qualification days
  3. Penalty for violating major safety rule
  4. Full or partial days of unpaid FMLA leave

# **Salary Basis Test**

- 5. Deductions in partial or full day increments from accrued leave banks, e.g., PTO bank, sick leave, vacation time;**
- 6. Deductions for full week if employee performs no work in the workweek; or**
- 7. Deductions in full day increments for days not worked in initial and last weeks of employment.**

# Salary Level Test

A Minimum Salary is Required to Qualify:

## Current Federal Rules:

- \$455/week salary test (\$23,660/year)

## Proposed Federal Rules: (\$35,300/year)

# **Job Duties Test**

## **Primary Exemptions from Overtime Requirements under the FLSA:**

- 1. Executive Exemption**
- 2. Administrative Exemption**
- 3. Professional Exemption**
- 4. Outside Sales Exemption**

# **Executive Exemption**

**Applies to Employees:**

- 1. Whose primary duty involves the management of an enterprise, or one of its departments**
- 2. who regularly supervises and directs two or more other employees, and makes or has input in hire/fire decisions;**
- 3. regularly exercises discretionary powers.**

# Administrative Exemption

Applies to employees who:

- Perform office or non-manual work directly related to management or general business operations of the employer, and
- Exercise discretion and independent judgment with respect to matters of significance

# **Professional Exemption**

- **Primary Duties include performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction**

# Outside Sales

- Exemption applies to employees who regularly make sales or obtain orders from customers away from the employer's place of business
- Wisconsin employees qualify only if they spend less than 20% of their time on “non-exempt” duties.

# **Compensable Time Wage & Hour Issues**

- **Travel time**
- **Work from home**
- **Continuous Work Day Rule**
- **Waiting Time**

# **Compensable Time Wage & Hour Issues**

- **On call time**
- **Paid Breaks/Automatic Lunch deductions**
- **Rounding of Worked Hours**
- **Unauthorized Overtime Must Be Paid – But May Be Disciplined**

# **Classes Protected From Discrimination Under Federal Law**

- **Federal Law Prohibits Discrimination on the basis of:**

**Race**

**Religion**

**Sex**

**Disability**

**Age**

**Pregnancy**

**Color**

**National Origin**

# **Wisconsin Fair Employment Act Adds**

**Marital Status**

**Ancestry**

**Sexual Orientation**

**Creed**

**Honesty Testing**

**Genetic Testing**

**Arrest or Conviction Record**

**Use of Lawful Products**

**Military Service**

# **Avoid Discrimination in the Hiring Process**

- **Job ads and application forms should include EEO statement**
- **Avoid suggestion that applicants with a criminal record or older, disabled or female applicants are not welcome (i.e. “Seeking recent college grads”)**
- **Limit duration that Application is valid**

# **Avoid Claims Based on Your Job Application**

- **Include authorization allowing you to confirm information and agreement to release any liability associated with those confirmation efforts**
- **Additional authorizations/disclosures may be needed to comply with FCRA**
- **Advise that omissions, falsifications or misrepresentations may result in rejection**
- **Make job offers contingent on successful completion of background checks**

# Avoid Claims Based on Your Pre-Employment Inquiries

- Seek information legitimately related to the applicants ability to perform the job, and ask same questions of all applicants
- Do not elicit information arguably tied to a protected classification such as age, sexual orientation, use of alcohol or tobacco, or pregnancy
- OK to ask about convictions & pending arrests to evaluate “substantial relationship” to duties of the job

# Background Checks

Consider conducting background checks and drug tests only after contingent offer is made, and limiting review of convictions to those no more than 7 years old

Use prior convictions or pending arrests to screen applicants only if “the circumstances of the offense substantially relate to the circumstances of the job” creating risk that the individual would re-offend

# **Background Checks Through a Credit Reporting Agency**

- **FCRA requires prior written disclosure authorization form from applicant or employee**
- **Provide applicant\EE with Report and Notice of Rights & reasonable time to respond before taking adverse action against EE or applicant**
- **Notify applicant or EE of adverse action, address of CRA, right to obtain free copy of Report from CRA and dispute its accuracy**

# Reduce Discrimination, Harassment and Retaliation Claim Risks

- Develop and enforce appropriate policies prohibiting discrimination, harassment and retaliation
- Develop and consistently enforce appropriate disciplinary policies
- Provide supervisor & employee training

# **Don't Impose “100% Healed” Rule**

- **Engage in Interactive Process**
- **Evaluate accommodations including Medical Leave**
- **Consider “Light Duty” Rule for Workers Comp Injuries Only**

# Pregnancy Discrimination

The Pregnancy Discrimination Act prohibits

- 1) Discrimination against women who are, have been or may intend to become pregnant; and
- 2) Discrimination based on assumptions about a pregnant woman's job capabilities or considerations for her/baby's health

# **Pregnancy Discrimination - Common Allegations**

- **Discharge based on pregnancy;**
- **Closer scrutiny/harsher discipline than that applied to non-pregnant employees;**
- **Suspension pending medical releases;**
- **Employee subjected to unnecessary job restrictions, forced leave or medical examinations that are not job related or consistent with business necessity**

# **Pregnancy Discrimination – EEOC Guidance:**

**“An employer must treat a pregnant employee temporarily unable to perform the functions of her job the same as it treats other employees similarly unable to perform their jobs, whether by providing modified tasks, alternative assignments, leave or fringe benefits.”**

# **Pregnancy Discrimination – To Avoid Claims:**

**Employers must permit female employees to change their schedules or use sick leave for lactation-related needs if other employees are granted similar accommodations for routine medical appointments and to address non-incapacitating medical conditions**

# **Reduce Discrimination and Retaliation Claim Risks**

**Avoid “Impulse” Terminations for Misconduct:**

- **Use Unpaid Suspension pending Review**
- **Review paper trail**
- **Evaluate potential claims**

# **Employers Can Win Unemployment Appeals**

## **Voluntary termination:**

- **demonstrated by word, action or conduct inconsistent with continuation of the employment relationship.**
- **No/Show - No/Call Policy**
- **“Quit or be Fired” = termination**
- **“Consider quitting to avoid record of discharge” puts decision with EE**

# **Unemployment Appeals – Disqualified due to Misconduct**

**Substantial fault - includes those acts or omissions of an employee over which the employee exercised reasonable control and which violate employer's reasonable requirements – but not inadvertent errors made by the employee, or failure due to insufficient skill, ability, or equipment.**

# **Unemployment Appeals – Disqualified due to Misconduct**

- **Deliberate disregard of standards of behavior that employer has the right to expect**
- **Refusal to perform assigned duties**
- **Theft/dishonesty**

# **Unemployment Appeals – Disqualified due to Misconduct**

- **Attendance violations**
- **Drug use – with right policy**
- **Insubordination**